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IN THE

Supreme Court of the United States

October Term, 1944

No. 403

WILLIAM MAHER,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF

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Law Briefs—OMAHA LINO-SLUG CO.—418 So. 15th St.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF

———o—o———

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION SOUGHT TO BE REVIEWED

Your petitioner, William Maher, respectfully prays that a Writ of Certiorari issue to review a final decision of the Supreme Court of Nebraska, the highest Court of said State, rendered on March 17th, 1944, at Lincoln,

Nebraska (R. pp. 97 to 116, incl.), and which is reported in —— Neb. ——, 13 N. W. (2d) 641, which decision, by an unanimous Court, sustained the conviction of your petitioner in the District Court of Douglas County, Nebraska, at which trial at Omaha, Nebraska, the Honorable Harry D. Landis, Nebraska District Judge, pursuant to Nebraska law, was called from a Judicial District of Nebraska, other than the one he was elected from, to preside at said jury trial.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED

Petitioner was arrested by police officers, without a warrant, in Omaha, Nebraska, on February 25th, 1942 (R. pp. 43-44 and p. 53), and was held on an alleged "open charge of Investigation" (R. 51), until a preliminary complaint was filed against him in the Municipal Court of Omaha, Nebraska, on February 27th, 1942 (R. pp. 3-4 and p. 47). The pertinent portion of the charging part of Count 1 of this Complaint (R. p. 3), which is the only material Count in this inquiry, was as follows:

> "that William Maher and Tony Scavio, on or about the 25th day of February, 1942, in the County aforesaid and within the corporate limits of the City of Omaha aforesaid, then and there being, the said William Maher and Tony Scavio did then and there wilfully and maliciously attempt to set fire to and burn, committing acts preliminary thereto and in furtherance thereof a certain building situated at 3011 St. Mary's Avenue in the City of Omaha, County of Douglas, State of Nebraska, owned by Lucille F. Lanphier, and personal property consisting of fixtures of the value of $500.00 belonging to Raymond C. Agosta and situated at and in the premises located at 3011 St. Mary's Avenue in the City of Omaha, County of Douglas, State of Nebraska."

This prosecution and the foregoing complaint were grounded upon Section 28-5,101 of the Compiled Statutes of Nebraska, which is a portion of the "so-called" "Uniform Arson Law."

> "Arson, Fourth Degree, Penalty. Any person who wilfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections, or who commits any act preliminary thereto, or in furtherance thereof, shall be guilty of arson in the fourth degree and upon conviction thereof be sentenced to the Penitentiary for not less than one nor more than two years or fined not to exceed One Thousand oDllars. The placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall, for the purpose of this act, constitute an attempt to burn such building or property." (1935 Supplement to Statutes, p. 217.)

A warrant was issued in pursuance of said complaint on February 27th, 1942, and same was served on the petitioner that day (R. 2). On February 27th, 1942, the prosecutor requested the Court to set the preliminary hearing for a future date. This was objected to by Mr. North, attorney for the petitioner, who demanded an immediate hearing and after an all morning discussion the hearing was continued to March 5th, 1942 (R. p. 51 and p. 4). The petitioner demanded a hearing in the Police Court the morning of his arrest, but the hearing was ultimately put off for two weeks (R. p. 65). The petitioner entered a plea of not guilty on March 5th, 1942 (R. pp. 4 and 47), and was granted a separate trial, which was to be had on March 8th, 1943.

On March 5th, 1942, petitioner's attorney, Mr. North, moved to dismiss the complaint because of the denial to petitioner of a speedy and impartial hearing and contended that the failure of the State to accord the petitioner a speedy trial was violative of the due process clause of the 14th Amendment to the United States Constitution (R. p. 52).

Further continuances were had to March 6th, March 9th, March 10th, March 11th and March 13th, 1942 (R. p. 48).

On March 13th, 1942, after a preliminary hearing was had the petitioner was bound over to the District Court to stand trial, one of the charges being that Contained in Count 1 of the complaint, which charged "Arson in the Fourth Degree," and he was released on bail (R. p. 2).

On March 17th, 1942, an Information was filed in the District Court of Douglas County, Nebraska, the pertinent portion of the charging part of Count 1 thereof, which is the only material Count in this inquiry, was as follows:

> "That on or about the 25th day of February, 1942, William Maher and Tony Scavio, late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska aforesaid, then and there being, did then and there wilfully and maliciously attempt to set fire to and burn, committing acts preliminary thereto and in furtherance thereof a certain building situated at 3011 St. Mary's Avenue in the City of Omaha, County of Douglas, State of Nebraska, owned by Lucille F. Lanphier, and personal property consisting of fixtures of the value of $500.00, belonging to Raymond C. Agosta, and situated at and in the

premises located at 3011 St. Mary's Avenue in the City of Omaha, County of Douglas, State of Nebraska."

After the filing of the Information the petitioner demanded of members of the County Attorney's office, on three or four occasions, that they give him a trial in said case (R. pp. 65 and 66), but no speedy trial was had. He further testified that from the time of the preliminary hearing up to the trial date in the District Court, that "there were lots of different juries and Courts in session," and that he was demanding trial of his case and wanted to get it over with as it was keeping him in town; that he was going to try to go back to the navy (R. p. 58), where he served during the last war (R. p. 56), but he had to wait for his trial in this case (R. p. 59).

The petitioner's attorney, Mr. North, from the inception of the case in Police Court, demanded a trial of the case (R. pp. 51 and 92), and a month previous to his actual trial in the District Court, resisted the State's Application for a Continuance, because one of their material witnesses, a Mr. Campen, was away (R. pp. 66, 67, 68 and pp. 81-82), but no trial was accorded the petitioner until March 9th, 1943 (R. p. 11), which lacked sixteen days from being one year after the Information was on file in the District Court, said filing date being March 17th, 1942.

That when the State of Nebraska determined to try the petitioner, the testimony of the following witnesses for the defense were not available (R. pp. 73 to 82, incl., and pp. 55 to 65, incl.).

Raymond C. Agosta, one of the parties named in the complaint and who owned the personal property men-

tioned therein, had died of appendicitis 20 minutes before the trial was called (R. p. 73 and R. p. 75, also see R. pp. 66-67).

Mike Scavio was drawn under the Selective Service and was in the United States Army (R. p. 69 and R. p. 76).

William Joseph was drawn under the Selective Service and was in the United States Army (R. pp. 76-77).

Harry Ostrum was in the United States Army at Camp Clebourne, Alabama (R. pp. 70-71, and R. pp. 77-78).

Emmett Gardner was drawn under the Selective Service and was in the United States Army at Lowry Field, Colorado (R. p. 78).

Joseph Sullivan had died suddenly (R. pp. 61-62).

Harry Kane was drawn in the Selective Service and was in the United States Army at a Radio Technical School at Kansas City, Kansas (R. pp. 69-70 and R. pp. 78-79).

Rudolph Braun was drawn in the Selective Service and was in the United States Army at Fort Riley, Kansas (R. pp. 71-72 and R. p. 79).

Lawrence Scavio was in the United States Army and was stationed at Fort Ord, California (R. pp. 68-69 and R. pp. 79-80).

Selective Service employees testified that Lawrence Scavio (R. pp. 68-69), Mike Scavio (R. p. 69), Harry

Kane (R. pp. 69-70), Harry Ostrum (R. pp. 70-71) and Rudolph Braun (R. pp. 71-72) were actually called in the Selective Service and were in the United States Army.

What these nine witnesses would testify to is shown in the testimony of the petitioner (R. pp. 55-65) and in the Motion for a Continuance (R. pp. 73 to 82), which facts, stated in the Motion, were sworn to under oath by Mr. North, said oath being administered by the Court (R. p. 81).

The case was called for trial when Mr. North, the petitioner's only attorney, was ill (R. p. 74 and R. p. 82) and when his Doctor certified to the Court that he would not be physically able to do this Court work for several weeks (R. pp. 85-86), when he could not secure the services of a lawyer or a law firm whom he had negotiated with and who were busy on other matters (R. p. 75).

All of the foregoing was made the basis of a Motion for a Continuance (R. pp. 78 and 82, incl., and R. pp. 85-86), which, as aforesaid, was under oath (R. p. 81), but the Motion for a Continuance was denied (R. pp. 82-83), with the admonition by the Trial Judge: "I am going to treat you right as to your health"—"I am going to watch your situation and see that you are looked after" (R. p. 83). The Court further said: "We are now about to impanel the jury in this case of State vs. Maher, and I am informing the defendant in the presence of his counsel and counsel for the State that he should see that he has co-counsel with Mr. North in case Mr. North should not feel strong enough to proceed, the case will proceed, and that he had better obtain counsel to assist Mr. North so that he can go ahead with the case to a final conclusion." And, mind you, all of this was said when the

trial was commencing and both counsel and the defendant were obliged to be present in Court and in attendance daily. The Court also asked Mr. North if he wanted to recess until one-thirty or two o'clock and Mr. North said "anytime." The Court asked Mr. North if he was feeling better and Mr. North said "Yes." (R. p. 132 and R. pp. 134-135), all of which indicated that the Court was fully cognizant of Mr. North's condition, and honestly believed he was ill as he claimed to be.

Prior to the commencement of the trial petitioner filed and presented to the Court a Motion to Quash (R. pp. 6 to 8, incl.), which was overruled (R. p. 9), and a Demurrer (R. p. 9), which was also overruled (R. p. 10). On March 8th petitioner was granted a separate trial (R. p. 10), was arraigned in chambers and stood mute (R. p. 10 and R. pp. 83 to 85, incl.), and a plea of "Not Guilty" was entered in his behalf (R. p. 85).

A jury was selected to try the case (R. pp. 11 and 12) and thereafter, at the close of the State's case in chief, the petitioner made a "Motion to Discharge the Jury, or For a Directed Verdict" (R. pp. 87 to 91, incl.), which was denied by the Court (R. p. 91), and a "Motion to Dismiss the Case" (R. pp. 91 to 93, incl.), which was also overruled (R. p. 91), and petitioner also made a Motion for a Directed Verdict at the close of all of the Evidence (R. pp. 92 to 96, incl.), which was denied by the Court (R. p. 96), all three of which Motions, and all of the aforementioned pleadings, amply preserved the points heretofore disclosed, and repeatedly called the attention of the trial Court to the legal questions involved in this case and herein advanced.

At this time we desire to set forth a resume of the evidence in the case which the State claims proves the

petitioner guilty of the alleged offense, but which we claim is insufficient in law. This resume is from the opinion of the Nebraska Supreme Court and is accurate and correct and is to be found in the Printed Record at pages 110 to 113, inclusive:

> "The defendant contends that the evidence is insufficient to establish the CORPUS DELICTI of the crime charged and that under the rule as to circumstantial evidence it is insufficient to sustain defendant's conviction.
>
> "Evidence offered by the State shows that Raymond C. Agosta owned the fixtures and operated a restaurant and beer business at 3011 St. Mary's Avenue, Omaha, Douglas County, Nebraska, known as the Red Rooster Cafe. His wife, Rosie, was a sister of Tony, Lawrence and Mike Scavio, who will be referred to herein. Agosta had been trying to sell his business but had been unsuccessful in doing so. He had removed or changed some of the equipment in the restaurant. On January 15th, 1942, he purchased fire insurance on the contents in the sum of $1,300. There was very little stock in the place on Februaary 24, 1942.
>
> "On the afternoon of February 24, 1942, the defendant, William Maher, rented a car from the Capitol Drive It Yourself Co., in Omaha, and went to the Continental Can Co., where he purchased two square five-gallon cans similar to the one found at the cafe. Later that evening, or rather in the early morning of February 25th, at about 2:30 A. M., Lickert and Elias, officers of the Omaha police force, stopped their cruiser car on St. Mary's Avenue, just east of the cafe, to assist a resident of the city, who was asleep in his car. At that time the cafe was closed. They awakened him and finding his condition such that he was not able to drive, took him to his home. It might be mentioned that a heavy snow had fallen and generally the sides of the street were blocked with snow

and only the lanes for traffic were open. The car in which the resident was asleep was in the traffic lane on St. Mary's Avenue, just east of the cafe.

"After taking this party home the officers, some time between 3:30 and 4:00 A. M., while driving down St. Mary's avenue, noticed that all of the lights in the cafe were out and the door was slightly open. They stopped their car and Officer Lickert immediately went to the front door, and Officer Elias flashed the spotlight on the cafe and started to go to the back door, but changed his mind and likewise came to the front door. When are car stopped someone closed the door of the cafe, dropped down and to the back of the room. When Officer Lickert came to the door the defendant was crouched in the back of the front room. Upon being asked what he was doing, he told Officer Lickert that everything was all right. However, Officer Lickert, who had previously drawn his gun, insisted on the door being opened. Upon entering they turned on a beer sign.

"It might be well to mention here that the cafe fronts north on St. Mary's avenue and is not exactly rectangular because of the diagonal direction of the avenue. The inside of the building is partitioned into two rooms, the front room being larger than the back, with two doors in the partition. The one door is on the east and just back of the bar and restaurant counter located in the east part of the front room. The other is in the west part of the partition just back of the booths located in the west part of the front room. The transom above the street door was open.

"When Officers Lickert and Elias entered the room, Tony Scavio, who was also in the building, had on his overcoat and hat and the defendant had on his hat and his overcoat and was near the door, lying over a cigarette machine. Just to the left of the door and between the counter and juke box, which was just on the left as you entered, was a five-gallon can,

similar to the one the defendant had purchased the previous afternoon, with the lid off and containing a small amount of gasoline. Gasoline was generally distributed over the bar and lunch counter, the floor, on top of and under the seats of the booths, and on the equipment back of the counter. Such things about the place as napkins, napkin holders, newspapers, rags and other miscellaneous items were soaked with gasoline. Standing in the open doorway of the west partition door was another can, similar to the one the defendant had purchased the previous afternoon, full of gasoline and with the lid removed. Neither lid of these two cans was found at the cafe. While the officers were there the defendant said he thought the gas was on and went back of the counter and apparently closed the jets on the gas stove. When the officers entered the room it was filled with gasoline fumes. Being asked how the gasoline got there, Scavio said he did not know, and the defendant kept still.

"Without being searched, the defendant and Scavio were both taken to police headquarters in the car of Officers Lickert and Elias. The defendant rode in the front seat on the right-hand side and Scavio in the back seat on the right-hand side and they both got out that side at the police station. Some five or ten minutes thereafter one of the officers discovered, near the right front fender of this car, two caps similar to those used on cans such as they found at the cafe, also a pair of gloves soaked with gasoline. Upon being searched they found the key of the car in defendant's shoe. The car the defendant had rented was found parked on Thirtieth Street, just south of St. Mary's Avenue. On the floor mat in front of the back seat were found heavy square indentation marks, the same as would be made by the cans found in the cafe, and some oily substance was on the mat around the marks.

"Evidence was offered by the defendant to show that the removal and exchange of fixtures was done

prior to the purchase of the insurance. Defendant admits that he purchased the two cans, but states that he purchased the same for Lawrence Scavio, who had asked him to do so several days prior to February 24, 1942. That Lawrence wanted him to leave them at the cafe in order that he might have them filled with gasoline, as he was going to drive a car from Chicago to the west coast and wanted to pick up some extra gasoline. Defendant testified he took the empty cans out to the cafe around 8:30 P. M. of the evening of the 24th, and gave them to Raymond C. Agosta. While there Agosta told him that Tony Scavio was going to take care of the cafe that evening and he would like to have him come out and help him. He told Agosta that he was busy the early part of the evening, but if he could he would come out later. That he returned later that evening, some time between 12:30 and 1:00 A. M. of the 25th. Upon arriving at the cafe he was immediately called to the back room by Tony Scavio and remained there during the entire time he was at the cafe. When he entered the cafe he did not observe either of the cans which were later found there. That Tony Scavio waited on business whenever anybody came in, but always returned to the back room, where they played pitch while he drank beer and Scavio drank whiskey. Customers came in and out until late in the night, when two men came in, who seemed to be considerably under the influence of liquor. Scavio waited on them and then they left, but shortly thereafter, between 2:00 and 2:30 A. M., one returned, and he and Scavio got into an argument. He heard some confusion in the front room, but did not go out. Scavio finally put the man out and came back to the room and told him that he had spilled something and got a rag to wipe it up. When he came back he told the defendant that some officers had just picked up the drunk. They then remained in the back room for some time, but at no time, while he was in the back room, did he smell any gasoline fumes. As they went to leave he walked

through the west partition door into the front room, where he noticed gasoline fumes for the first time. Scavio then told him that in the scuffle the customer had knocked over a can of gasoline and some had spilled out onto the counter and floor. Scavio had just turned out the back light and there was still a light burning in the front and that they had just opened the door and were about to leave when the officers drove up. He also testified they had just opened the transom and door to clean up the place.

"This is necessarily an abbreviated statement of facts contained in a lengthy bill of exceptions, but fairly presents the events that transpired during the course of February 24th and the early morning of February 25th, 1942, as disclosed by the evidence."

It wil be noticed that there was no fire set nor any burning of any kind testified to by anyone.

On March 16th, 1943, the jury found the petitioner guilty on Count 1 of the Information, to-wit: Arson in the Fourth Degree (R. p. 21). A "Motion for a New Trial" was filed within the statutory period of time (R. pp. 22 to 30, incl.), in which the petitioner's rights, as herein contended for, were fully preserved and same was overruled (R. p. 32). A "Motion in Arrest of Judgment" was filed thereafter upon the ground that "the facts stated in the Information do not constitute an offense," which Motion was made pursuant to the Nebraska law (R. p. 30), which was overruled.

The defendant was sentenced to two years' imprisonment in the Nebraska State Penitentiary (R. p. 31). A Notice of Appeal was filed (R. p. 33); "Application for Suspension of Execution of Sentence" was filed (R. pp. 33-34), together with bond (R. p. 33). A "Petition in

Error'' was filed, in which all of petitioner's rights, as herein contended for, were preserved (R. pp. 34 to 42, incl.).

After the Court rendered its Opinion on March 17th, 1944, affirming the judgment and sentence of the lower Court (R. pp. 97 to 116, incl.), a ''Motion to Stay the Mandate'' was filed (R. pp. 116-117) and an Order was entered staying same (R. p. 125). A Motion for Diminution of the Record and supporting affidavit were filed (R. pp. 117 to 120), and same was denied (R. p. 126).

Within the provided time, and as provided for by Nebraska law, a ''Motion and Brief for Rehearing'' was filed in the Supreme Court of Nebraska (R. pp. 121 to 125, incl.), which Motion was overruled on April 15th, 1944 (R. p. 125). This Motion, we believe, presented succinctly the exact questions now sought to be reviewed by this Court.

Within the three months' period provided for by the laws of the United States the record was transmitted to the Clerk of the Supreme Court of the United States for printing and by order of a Justice of the Supreme Court petitioner was granted until September 1st, 1944, to file his Petition for Writ of Certiorari and supporting Brief.

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked:

(a) Under Section I of the 14th Amendment to the Constitution of the United States, which provides that:

> ''all persons born or naturalied in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of liberty * * * without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws."

(b) Under Section 237 of the Judicial Code, as amended, now Section 344, Title 28, U. S. C. A.

The judgment sought to be reviewed, as aforesaid, is the judgment of the Supreme Court of Nebraska, entered on March 17th, 1944, and which became final and appealable upon the overruling of the Motion for a Rehearing on April 15th, 1944.

QUESTIONS PRESENTED

1. Was the petitioner herein denied a speedy trial in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law in the following particulars, and each of them?

(a) In that he was arrested without a warrant and no preliminary complaint was filed before the Examining Magistrate against him, for a period of two days, although Grenville P. North, counsel for the petitioner, demanded that a specific charge be filed or that the petitioner be discharged in the premises.

(b) In that the preliminary hearing before the Examining Magistrate in this case was not speedily held or given, but was unnecessarily delayed and prolonged, although repeated objections were made by Grenville P. North, Counsel for the petitioner, to con-

tinuances granted at the request of the State, and unnecessary delays were had on the part of the State in the conducting of said preliminary hearing.

(c) In that no trial was given the petitioner in the District Court of Douglas County, Nebraska, although repeated demands were made by petitioner and his counsel, Grenville P. North, to have said case tried with promptness and dispatch and said trial was continued from time to time and from court term to court term over the objections of said counsel for the petitioner, for a period of about one year, and no trial was accorded the petitioner until seven of his witnesses were absent from the jurisdiction of the Court and at least five of these seven were in the Armed Forces of the United States and two of his most important witnesses had died, and when Grenville P. North, the only attorney for the petitioner, was seriously ill, and in spite of said illness was compelled to proceed to try said case or surrender the defense of his client, at the inception of or during the trial, to some newly acquired counsel not yet procured, who, necessarily, would be unfamiliar with the facts in the case, and who would not have had any time prior to the actual trial of the case to familiarize himself with the case and formulate a trial plan.

2. Did the Information upon which the petitioner was prosecuted and convicted charge a crime and was his conviction violative of that portion of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law, in the following particulars, and each of them?

(a) It did not advise the petitioner of the nature and cause of the accusation made against him.

(b) It was incoherent, indefinite and uncertain.

(c) It was so lacking in clarity that no one could intelligently enter a plea to the same, and of necessity the petitioner was forced to stand mute.

(d) It was not alleged that the doing of the things charged in Count 1 of the Information, the Count upon which a conviction was had, were "contrary to the form of the statutes of the State of Nebraska in such cases made and provided, and against the peace and dignity of the State of Nebraska." (This allegation followed Count 2 of the Information, but petitioner was acquitted on that Count and this language in same could not be transplanted legally to Count 1.)

3. Was the Petitioner denied due process of law in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States in the following particulars, and each of them?

(a) In that he was never arraigned, as provided for by the laws of the State of Nebraska.

(b) In that no plea of "not guilty" was ever entered on the Information, as provided for by the laws of Nebraska.

(c) In that no legal arraignment of the petitioner was ever had.

4. Was the petitioner prevented from having a fair and impartial trial under law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States relating to due process of law in the following particulars, and each of them?

(a) In that no trial was accorded the petitioner in the District Court of Douglas County, Nebraska, until seven of his important witnesses were absent from the jurisdiction of the Court and in the Armed Forces of the United States, and his most important witness, Raymond A. Agosta, had died, and another important witness by the name of Joe Sullivan had died.

(b) In that petitioner was wrongfully denied a continuance because of the absence from the jurisdiction of seven of his said witnesses.

(c) In that when the case was finally called for trial, Grenville P. North, the only counsel for the petitioner, was seriously ill and his motion for a continuance on that ground, and also because of the absence of his witnesses, was wrongfully denied and he was compelled to proceed to try the case himself or to surrender the defense of his client to some newly acquired counsel who was not familiar with the facts of the case and who would not have had any time prior to the commencement of the actual trial to acquaint and familiarize himself with the case and formulate a plan of trial.

5. Was the statute upon which this prosecution and conviction was had, namely, Section 28-5,101, Comp. St. Supp., 1941, unconstitutional and null and void and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that the petitioner could not be accorded, under that statute, due process of law, in the following particulars, and each of them?

(a) Because no norm or standard of conduct is set up in said law.

(b) Because the ultimate operative fact presumed by said statute has no rational connection to the fact to be proved, and the statute provides for the inference of one fact from proof of another fact, which is so unreasonable as to be a purely arbitrary mandate.

(c) The presumption created has no relation in experience to general facts.

(d) Because the statute attempts to declare an individual guilty, or presumptively guilty, of a crime, and that is not within the province of the Legislature and conflicts with and tends to nullify the presumption of innocence.

(e) In that the said statute attempts to and does declare that to be a fact which is not a fact, and that to be true which is not true.

6. Was the evidence adduced by the State, as well as the evidence upon the whole trial, insufficient in law to sustain a conviction, and was the petitioner denied due process of law under Section 1 of Article XIV of the Amendments to the Constitution of the United States when the case was not dismissed pursuant to appropriate motions made to the Trial Court, or reversed and dismissed by the Nebraska Supreme Court?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The discretionary power of this Court to grant a Writ of Certiorari is invoked upon the following grounds:

First—Because "due process of law" under Section 1 of Article XIV of the Amendments to the Constitution

of the United States contemplates that an arrested person have a preliminary complaint filed against him promptly, that he be given a speedy preliminary hearing, and that after being bound over for trial there be no unnecessary delays and that he be accorded a speedy trial on the merits. In the instant case the record discloses an utter disregard on the part of the prosecution to proceed with due dispatch until almost one year's time had elapsed and when two of the petitioner's most material witnesses had died, and two others were absent from the jurisdiction of the Court, and five other material witnesses were in the Armed Forces of the United States, and counsel for petitioners was very ill and had no opportunity to have co-counsel try the case or sit with him in said trial.

Second—Because "due process of law" under Section 1 of Article XIV of the Amendments to the Constitution of the United States contemplates that an accused person be advised in plain, understandable language of the nature and cause of the accusation made against him and his said rights are denied to him when he is called upon to plead to a vague, incoherent and non-informative charge.

Third—Because "due process of law under Section 1 of Article XIV of the Amendments to the Constitution of the United States requires that an arraignment should be had pursuant to established law and if the law requires same to be had in open Court then an arraignment in Chambers will not suffice and all of the law relating to the particulars of receiving and recording the plea of the defendant should be complied with.

Fourth—Because "due process of law" under Section 1 of Article XIV of the Amendments to the Constitution of the United States contemplates that a defendant, who at all times had exercised due diligence, should, upon

a proper showing, be granted a continuance and should not be forced into trial arbitrarily by a Court at a time when, through delay on the part of the State, two of his material witnesses for the defense had died, two were out of the jurisdiction, and five were in the United States Army, pursuant to the Selective Service Regulations, and defendant's counsel was ill. That a proper regard for the legal rights of a defendant should dictate that he be given an opportunity to secure the testimony of his living witnesses, either by their personal presence in Court or by their depositions, and that a defendant be privileged to be represented on his trial by a well, and not a lawyer who is seriously ill.

Fifth—Because "due process of law" under Section 1 of Article XIV of the Amendments to the Constitution of the United States contemplates that a defendant be prosecuted upon a valid statute wherein a norm or standard of conduct is set up with such definiteness and clarity so that one may be able to determine from a reading thereof that which is declared by the law to be unlawful, and no legislative enactment is constitutional where the ultimate operative fact presumed by the statute has no rational connection to the fact to be proved, and which provides the inference of one fact from proof of another fact which is so unreasonable as to be a purely arbitrary mandate. A statute which indulges in presumptions of guilt from certain conduct, or which provides that to be an attempted offense, which as a matter of fact is not an attempt to commit an offense, is an unconstitutional law.

Sixth—Because "due process of law" under Section 1 of Article XIV of the Amendments to the Constitution of the United States contemplates that before a de-

fendant may be convicted on direct evidence he must be proved guilty in the way and manner that the State law provides—that is, beyond a reasonable doubt, in Nebraska (Instruction No. 4, R. p. 5)—and if the evidence is circumstantial, as the instant case discloses, then he must also be proved guilty in the way and manner that the State law provides, that is, as stated by the trial Judge in Instruction No. 11 (R. pp. 18-19), by evidence "of such a conclusive and positive nature as to exclude to a normal certainty every rational hypothesis except that of defendant's guilt." If the evidence is insufficient as a matter of law no state has the right to pronounce or enforce a Judgment and Sentence on same.

PRAYER

Wherefore, your petition prays, that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of Nebraska, to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Nebraska had in the case numbered Nebraska 31647, entitled, William Maher, Plaintiff in Error, vs. The State of Nebraska, Defendant in Error, —— Neb. ——, 13 N. W. (2d) 641, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said Nebraska Supreme Court may be stayed and the petitioner be released on bail during the pendency of this appeal, and that the judgment of the Supreme Court of Nebraska may be reversed by this Court, and for such other and further relief as to this Court may seem proper.

EUGENE D. O'SULLIVAN, and
GRENVILLE P. NORTH,
Attorneys for Petitioner.